

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

AUG 12 2003

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IN THE UNITED STATES COURT OF APPEALS
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CLERK

448
ELOUISE PEPION COBELL, et al.,
Appellees,

v.

GALE A. NORTON, as Secretary of
the Interior, et al,
Appellants

No. 03-5063
[consolidated with
No. 03-5084 and
No. 03-5097]

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ORIGINAL
(P-11-12)
FEDERAL GOVERNMENT'S MOTION FOR
VOLUNTARY DISMISSAL OF CONSOLIDATED APPEALS

In Nos. 03-5063 & 03-5097, the government has appealed from rulings that reject assertions of the attorney-client and work product privileges and establish a framework for future invocations of the privileges in this litigation, on the basis of what the district court understood to be a "fiduciary exception" to the privileges. The government's opening brief is due September 9, 2003. Oral argument is scheduled for January 12, 2004, before Circuit Judges Edwards, Sentelle, and Tatel. For the following reasons, the government now moves to dismiss its appeals.

BACKGROUND

1. These appeals arise out of a claim for an accounting of individual Indian money (IIM) accounts. The Court recently issued a decision in a related appeal arising out of the same case. See Cobell v. Norton, __ F.3d __, 2003 WL 21673009 (D.C. Cir. July 18, 2003).

The district court has allowed discovery into a broad range of issues. Discovery has been propounded, not only by plaintiffs, but also by the former "Court Monitor," Joseph S. Kieffer III, who was reappointed in April 2002 over the government's objection, see id. at *1.

As this Court explained, "the Monitor's portfolio was truly extraordinary; instead of resolving disputes brought to him by the parties, he became something like a party himself. The Monitor was charged with an investigative, quasi-investigatorial, quasi-prosecutorial role that is unknown to our adversarial legal system." Id. at *11. Moreover, by elevating Mr. Kieffer to the simultaneous role of Special Master, see id. at 13, the district court gave Mr. Kieffer additional broad powers to resolve discovery disputes and to recommend sanctions. See Order of March 5, 2003, 212 F.R.D. 48, 57-60 (D.D.C. 2003).

2. In connection with the discovery regime it had established, the district court articulated a framework intended to govern the Department of Interior's invocations of the attorney-client and work product privileges. In a ruling issued on December 23, 2002, the district court rejected a claim of privilege with regard to questions posed to James E. Cason, the Associate Deputy Secretary of Interior, regarding his communications with government counsel. See 212 F.R.D. 24 (D.D.C. 2002). The court held that otherwise privileged

attorney-client communications made in the course of this litigation are discoverable under a "fiduciary exception" if they relate to "trust administration." Id. at 31. The court further held that the government cannot invoke the attorney-client privilege for "litigation-related communications" with counsel unless it can demonstrate that the communications were made "solely to protect [the trustee] personally or the government from civil or criminal liability[.]" Id. at 30 (emphasis in original). The court added that, even where the attorney-client privilege is properly invoked, the assertion of privilege "may result in the drawing of an inference that the undisclosed communications were adverse to the beneficiaries' interests." Id. at 30 n.6.

On February 5, 2003, the court extended the same reasoning to invocations of the work product privilege. See Cobell v. Norton, 213 F.R.D. 1, 13 (D.D.C. 2003) ("As in the case of attorney-client privilege, this Court views the work product doctrine as applicable only where the material is developed exclusively for purposes other than the benefit of trust beneficiaries, i.e., solely to aid in litigation."). The court indicated that future attempts to assert privilege would be subject to sanctions if the court found the privilege claim to be inconsistent with its framework rulings. See id. at 14; see also Order of March 5, 2003, 213 F.R.D. at 59-60 ("Of course, as

recently demonstrated, the Court will consider the possibility of imposing sanctions in response to an improper instruction by counsel directing a deponent not to answer a question.").

3. The government filed notices of appeal from the district court's attorney-client and work product rulings. See Appeal No. 03-5063 (attorney-client); Appeal No. 03-5097 (work product). Secretary Norton filed a notice of appeal, in her individual capacity, from the attorney-client ruling. See Appeal No. 03-5084. Acting on its own motion, the Court consolidated these three appeals by orders dated March 27, 2003, and April 9, 2003.

Plaintiffs subsequently moved to dismiss the appeals as unripe. See Motion to Dismiss, at 5-6 (indicating that plaintiffs had not attempted to enforce the December 23, 2002 privilege order or to reschedule Mr. Cason's deposition so that the disputed question could be re-asked). The government opposed the motion, which was denied. See Order of June 9, 2003. The court referred the issue of jurisdiction to the merits panel. Ibid.

DISCUSSION

In the rulings at issue on these appeals, the district court has significantly curtailed the availability of the government's attorney-client and work product privileges. The government continues to believe that these rulings were incorrect and that they were appealable under this Court's decision in United States

v. Philip Morris, Inc., 314 F.3d 612 (D.C. Cir. 2003). Recent developments, however, have diminished the need for immediate appellate review.

The government's appeals were prompted in significant part by the extraordinary role assigned to Mr. Kieffer in this litigation. As this Court explained, in demanding access to Interior Department employees and documents, Mr. Kieffer essentially "acted as an internal investigator, not unlike a departmental Inspector General except that he reported not to the Secretary but to the district court." 2003 WL 21673009, at *10. At the same time, Mr. Kieffer was empowered to resolve discovery disputes brought to him by the parties and to recommend sanctions if he believed that the government's objections were inconsistent with the district court's framework rulings. See 212 F.R.D. at 57-60.

On July 18, 2003, this Court issued a writ of mandamus requiring Mr. Kieffer's removal from the case. The Court also provided guidance as to the appropriate use of Masters and Monitors, emphasizing that "it was surely impermissible to invest the Court Monitor with wide-ranging extrajudicial duties over the Government's objection." 2003 WL 21673009, at *11. The opinion made plain that the district court has no power to charge a special master or monitor "with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our

adversarial system." Ibid. See also id. at *13 (holding that Mr. Kieffer's "prior role and personal involvement in this case as Court Monitor would cause a reasonable person to doubt his ability to remain impartial while serving as Special Master").

Mr. Kieffer's removal eliminates a situation in which a Master-Monitor who should not have held his role in the first place was permitted to frame far-reaching discovery requests and also to attempt to resolve attorney-client privilege disputes. Indeed, since April 24, 2003, when this Court stayed Mr. Kieffer's appointment, no significant application of the district court's privilege framework has arisen, despite a 40-day trial concerning the Interior Department's accounting and trust management plans.

This Court's guidance regarding the proper scope of a Master's duties should preclude similar intrusions by other court personnel in the future. As plaintiffs have noted, they have not attempted to enforce the December 23, 2002 privilege order or to reschedule Mr. Cason's deposition so that the disputed question could be re-asked. See Motion to Dismiss, at 5-6. It is unclear at this point whether new applications of the fiduciary exception will result in rulings that may warrant appellate review. The government's dismissal of these appeals is without prejudice to its right to challenge any such future rulings, should they occur.

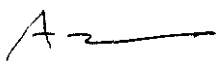
CONCLUSION

For the foregoing reasons, the government's appeals should be dismissed.

Respectfully submitted,

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AUGUST 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2003, I caused copies of the foregoing motion to be sent to the Court and to the following counsel by hand delivery:

The Honorable Royce C. Lamberth
United States District Court
United States Courthouse
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Washington, D.C. 20001

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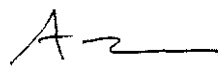
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and to the following counsel by federal express, overnight mail:

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and to the following counsel by first class, regular mail:

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145-7-1468

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August 12, 2003

Mr. Mark J. Langer
Clerk, United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
Room 5423
Third & Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Cobell v. Norton,
Nos. 03-5063, 03-5084, 03-5097 (D.C. Cir.)

Dear Mr. Langer:

Please find enclosed for filing in the above-captioned matter an original and four copies of the federal government's motion for voluntary dismissal of its consolidated appeals.

Thank you for your assistance.

Sincerely,

Alisa B. Klein
Attorney

ORIGINAL

cc: Hon. Royce C. Lamberth
Elliott H. Levitas
Keith M. Harper
Dennis Marc Gingold
Herbert Lawrence Fenster